Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1994

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

CARMEN REYES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Supreme Court of the State of New York, Appellate Division, First Department, erroneously concluded that the Fourth Amendent requires suppression of narcotics seized from the person of an individual, after the search of an apartment pursuant to a search warrant revealed contraband in that apartment, a photograph of the individual, and mail addressed to her, solely because the police detained her for ten minutes outside the door to her apartment in order to ensure their safety while they conducted the search?

Whether the Supreme Court of the State of New York, Appellate Division, First Department, erroneously concluded that, for purposes of the Fourth Amendment, a search warrant is executed when the police enter the subject premises, and thus that, absent observations that connect the individual to the premises, the police may not detain individuals found outside the premises during the duration of the entire search in order to ensure the safety of all concerned pending the actual search of the premises and to protect the integrity of the investigation?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No._

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-against-

Carmen Reyes,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

The Petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, entered in the above-captioned case on December 22, 1994.

Opinion Below

The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, *People v. Carmen Reyes,* A.D.2d (1st Dept. 1994), slip op. 12/22/94, and the Order of the New York Court of Appeals denying leave to appeal, *People v. Carmen Reyes,* ___ N.Y.2d ___ (1995), decided on January 31, 1995, are appended hereto in Appendix A and B, respectively. The Order of the Supreme Court of the State of

New York, Bronx County, dated December 3, 1993, is appended in Appendix D.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

Amendment IV of the United States Constitution provides:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides, in part:

> Section 1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

The following statement of facts is taken from the transcribed minutes of the pre-trial hearing to suppress physical evidence (Appendix C).

On February l6, 1992, ten police officers arrived at respondent's apartment in order to execute a no-knock search warrant authorizing a search of her apartment for narcotics. The affidavit in support of the warrant described a female Hispanic, approximately fifty years old, as one of the drug dealers located at that premises. Neither the warrant nor the affidavit named respondent. The warrant did not authorize the search of any individual, and the police did not know that respondent was the lessee of the apartment.

When the police arrived, respondent—a female Hispanic, age about fifty—and her male companion stood at the door of her apartment, and were detained (and not permitted to leave the area or enter the apartment) for ten minutes, while the police executed the warrant, in order to ensure the safety of the searching police and the integrity of the investigation. They were not frisked, searched or interrogated.

During their search of the apartment, the police found a loaded handgun, suspected narcotics (subsequent laboratory tests were negative), a framed photograph of respondent, and letters addressed to "Carmen Reyes" at that address. The police returned to the hallway and, after inquiry, learned that repondent's name was Carmen Reyes. She was then arrested, searched, and found to possess two ounces of cocaine, the *res* of this action. She was not charged with possession of the gun.

The record does not reveal whether her companion was searched. He was not arrested.

The Hearing Court's Decision

Having credited the testimony of the police, the court found a violation of the Fourth Amendment because respondent was not named in the search warrant, and it suppressed the cocaine seized from her person. It rejected the State's arguments that: (1) the discovery of contraband in her apartment provided probable cause for her arrest and the search of her person; and (2) that her initial detention was justified both to ensure the police officers' saftey as they conducted the search of the apartment and to protect the integrity of the investigation.

The Decision of the Supreme Court of the State of New York, Appellate Division, First Department

Relying on *Michigan v. Summers*, 452 U.S. 692 (1981), the State's intermediate appellate court noted that no connection had been established between respondent and the premises subject to the search warrant and that no justification existed for respondent's continued detention "after the search warrant was . . . executed" (Appendix A). The full text of the decision appears in Appendix A.

REASONS FOR GRANTING THE WRIT

POINT

The decision below that the Fourth Amendment requires suppression of narcotics seized from the person of an individual, after the search of an apartment pursuant to a search warrant revealed contraband in that apartment, a photograph of the individual, and mail addressed to her, soley because the police detained her for ten minutes outside the door to her apartment in order to ensure their safety while they conducted the search raises an important and recurring question of Fourth Amendment law which this court has never answered and on which the state courts have split.

This petition presents questions which this Court did not decide in *Ybarra v. Illinois,* 444 U.S. 85 (1979), and *Michigan v. Summers,* 452 U.S. 692 (1981), *to wit*: (1) whether the Fourth Amendment prohibits the limited detention of individuals in an area immediately adjoining a premises to be searched pursuant to a search warrant, for the ten minute duration of the search, in order to ensure the safety of the parties and maintain the integrity of a judicially-sanctioned investigation; and (2) whether the police reasonably may detain an individual, pending the judicially-sanctioned search of a premises for narcotics, absent an independent measure of justification rising to the level of that which would support the more invasive stop and frisk. *See, Michigan v. Summers, supra,* at pp. 697-98; *United States v. Martinez-Fuerte,* 428 U.S. 543 (1975) (check-point stops involving a lesser intrusion than detention by a roving patrol need not be based on reasonable suspicion); *Rivera v. United States,* 928 F.2d 592 (2d Cir. 1991) (general

authority to detain occupants during search of a premises does not justify further intrusion absent a particularized suspicion).

Here, the state courts erroneously held that *Summers* precludes the detention of persons found at the door step of the premises to be searched, for the safety of all concerned, unless "the police observe [a] connection between [those persons] and the premises in quesion prior to a search thereof." Moreover, the state appellate court, weighing the danger to the officers (*Michigan v. Summers, supra,* at p. 702), appears to have narrowed the definiton of the execution of a search warrant to the entry of the apartment alone.[1] The state appellate court thus impermissibly diluted the measure of control during the entire conduct of a search pursuant to a warrant which *Summers* defined as constitutionally permissible.[2]

This rationale and result is contrary to the law as announced by federal courts of appeal for the Sixth Circuit and the District of Columbia and the Supreme Courts of Connecticut, Delaware,

---

[1] This is readily inferred from the fact that probable cause developed as a result of the search, and respondent was thereafter properly subject to arrest.

[2] *People v. Milaski,* 62 N.Y.2d 147, 156 (1984), cited by the court, was clearly a response to the safety prong of *Summers.* Thus the decision does not rest on independent and adequate state grounds. Moreover, the opinion lacks the requisite "plain statement" that it does so, and the jurisdiction of this Court is not defeated. *New York v. Class,* 475 U.S. 106 (1986). The arguably factual basis of the appellate court's decision, which does defeat the jurisdiction of the Court of Appeals, is not a bar to review of the issue by this Court, since it may "undertake independent examination of factual issues when constitutional claims may depend on their resolution". *Berenyi v. Immigration Services,* 385 U.S. 630, 636 (1967).

and Colorado, *in banc,* which have found the detention of individuals proper under similar facts. *See United States v. Reid,* 997 F.2d 1576 (D.C. Cir. 1993) (detainee, not a resident, exited premises and went down stairs past police officers, frisk justified by officer's fears for his safety and detainee's proximity to the premises); *United States v. Cochran,* 939 F.2d 337 (6th Cir. 1991) (*Summers* did not impose a duty on the police based on geographic proximity); *State v. Torres,* 500 A.2d 1299 (Conn. 1985) (Hispanic male, knocking on door of premises, properly detained; affidavit described "Spanish male"); *Hovington v. State,* 616 A.2d 829, 831 (Dela. 1992) (detainee, in presence of two individuals subject to arrest warrants, fled upon seeing police), *aff'd* 647 A.2d 381 (Dela. 1993); *People v. Martinez,* 801 P.2d 542 (Colo. 1990) (detainee approached premises). It also differs from the statements of the law made by intermediate appellate courts in Florida, Georgia, Michigan, Oregon, Pennsylvania, Virginia, and Washington, all of which have sanctioned limited detention of individuals under similar facts. *See State v. Thomas,* 603 So.2d 1382 (Fla. App. 5th Dist. 1992) (detainee approached premises); *Belvin v. State,* 585 So.2d 1103 (Fla. App. 2d Dist. 1991) (detainee standing 2-6 feet from premises fled upon seeing police); *Wilson v. State,* 547 So.2d 215 (Fla.App.4th Dist. 1989) (detainee sitting in front of premises); *Claffey v. State,* 433 S.E.2d 441 (Ga. App. 1993) (detainees in vehicle arrived at premises); *People v. Zuccarini,* 431 N.W.2d 446 (Ct. of App. Mich 1988) (detainee outside premises near back door), *app. den.* 466 N.W.2d 282 (Mich. 1991); *State v. Cawrse,* 804 P.2d 513 (Ore. Ct. of App., 1991) (detainee in car stopped by police at driveway of premises in order to ascertain identity), *rev. den.* 813 P.2d 1064 (Ore. 1991); *Commonwealth v. Hoffman,* 589 A.2d 737 (Sup. Ct. Pa. 1991) (detainee knocked on door of premises), *app. den.* 608 A.2d 28 (Pa. 1992), *Hab. den. United States ex rel*

Hoffman v. Chesney, (E.D. Pa. 1994) 1994WL136975; *State v. Flores-Moreno,* 866 P.2d 648 (Ct. of App. Wash. 1994) (detainee matched general description in warrant seen closing trunk of car parked in driveway of premises), *rev. den.* 879 P.2d 292 (Wash. 1994); *Patterson v. Commonwealth,* 440 S.E.2d 412 (Ct. of App. Va. 1994) (detainee approached premises being searched and refused to leave).

The rationale and result of the New York court appears to conform to that reached by the the Eighth Circuit Court of Appeals in *United States v. Clay,* 640 F.2d 157 (8th Cir. 1981) (detention and frisk of detainee arriving at door of premises); and *United States v. Sherrill,* 27 F.3d 690 (8th Cir. 1994) (detainee left premises, stopped in car one block away); the Supreme Court of Pennsylvania in *Commonwealth v. Rodriguez,* 614 A.2d 1378 (Pa. 1992) (detainee, female hispanic, outside premises, officers lacked warrant but informant identified "Puerto-rican woman", and situation gave rise to exigent circumstances, *Summers* limited to its facts); and by intermediate appellate courts in California, New Jersey, New Mexico, and Texas, *en banc,* in *People v. Gallant,* 275 Cal.Rptr. 50 (Ct.App. 4th Distr. 1990) (detainee arrived at residence of another), *rev. den.; State v. Hall,* 600 A.2d 1248 (N.J. Sup. 1990) (detainee arrived at premises with another and tried to leave), *aff'd.* 600 A.2d 1221 (N.J. Sup. A.D. 1991); *State v. Graves,* 888 P.2d 971 (Ct. of App. N. M. 1994) (mere presence of non-resident on premises); *Lippert v. State,* 664 S.W.2d 712 (Ct. of Crim. App. Texas 1984) *en banc* (detainee merely on premises but not an occupant).

Thus, due to the pronounced differences in rationale and result that presently exist among the state and federal circuit courts which have responded to this fundamental question of

Fourth Amendment jurisprudence, this Court should use this case as the vehicle to finally settle these important and recurring questions.

The State believes that when police officers, engaged in the hazardous duty of executing a search warrant for narcotics, briefly detain an individual to secure their own safety and that of the detainee, who—like the officers—is in harm's immediate way, and the integrity of a judicially-sanctioned investigation, the seizure of contraband from the detainee upon probable cause developed during the search of the premises should not be deemed a violation of the Fourth Amendment. It is a matter of some concern that the state hearing court found that the police officers "exercise[d] rather good judgment in protecting themselves" but yet ruled that the constitutional rights of a citizen were concomitantly violated (Appendix C, H. 60). This tension needs to be addressed and eased. Under these circumstances, the State believes the New York Supreme Court, Appellate Division, First Department, erred in its application of the exclusionary rule, and requests that this Court issue a writ of certiorari to define the proper scope of the conduct of police officers while executing a search warrant and to resolve the conflict among the states regarding this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of Certiorari should be granted.

Respectfully submitted,

ROBERT T. JOHNSON,
District Attorney
Bronx County
Attorney for Petitioner

PETER D. CODDINGTON
ROBERT L. MOORE
Assistant District Attorneys
of Counsel

April 1995

APPENDIX A

Opinion of the Supreme Court of the State of New York, Appellate Division, First Department

Murphy, P.J., Rosenberger, Ellerin, Rubin, Nardelli, JJ.

53521-
53522

The People of the State of New York,

Appellant,

against

Carmen Reyes,

Defendant-Respondent.

Orders, Supreme Court, Bronx County (Lawrence Tonetti, J.), entered on or about November 5 and December 3, 1993, granting defendant's motion to suppress physical evidence, unanimously affirmed.

The residential search warrant herein did not name defendant, nor did the police observe any connection between defendant and the premises in question prior to a search thereof (*see, Michigan v. Summers,* 452 US 692). Further, the police were not justified, in the interest of safety in executing the warrant, in detaining defendant after the search warrant was, in fact, executed (*see, People v. Milaski,* 62 NY2d 147, 156).

THIS CONSTITUTES THE DECISION AND ORDER OF
THE SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

ENTERED: DECEMBER 22, 1994

s/Catherine O'Hagan Wolfe
CLERK

APPENDIX B

Denial of Leave to Appeal by the New York Court of Appeals

State of New York
Court of Appeals

Before: Hon. Joseph W. Bellacosa, Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

Carmen Reyes,

Respondent.

I, JOSEPH W. BELLACOSA, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented

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*Description of Order:
Order of the Appellate Division, First Department, dated December 22, 1994, affirming orders of the Supreme Court, Bronx County, entered on or about November 5 and December 3, 1993, granting defendant's motion to suppress physical evidence.

which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
January 31, 1995

Joseph W. Bellacosa
Associate Judge

APPENDIX C

Transcribed Minutes of the Supression Hearing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 31

THE PEOPLE OF THE STATE OF NEW YORK

against

CARMEN REYES,

Defendant.

INDICTMENT #7388/93

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851 Grand Concourse
Bronx, New York
November 4, 1993

BEFORE:
HONORABLE LAWRENCE TONETTI,
Justice.

APPEARANCES:
ROBERT T. JOHNSON, ESQ.,
DISTRICT ATTORNEY, BRONX COUNTY
For the People.
BY: LORI CONNORS, ESQ.,
Assistant District Attorney

LOUIS ALPERIN, ESQ.,
For the Defendant.
22 West First Street
Mount Vernon, New York

OFFICIAL SPANISH INTERPRETER

FRANCENE JACOBS
Official Court Reporter

* * *

PROCEEDINGS

(2) (Whereupon, the following takes place in open Court in the presence of the Court, Defense Counsel, the Assistant District Attorney, Official Spanish Interpreter, and the Defendant.)

Court Clerk: This is indictment number 7388 of 1993, Carmen Reyes.

Note for the record the presence of the Spanish interpreter for these proceedings.

Counsel, your appearance.

Mr. Alperin: Louis Alperin, 22 West First Street, Mount Vernon, New York.

Ms. Connors: Lori Connors for the Office of the District Attorney.

The Court: Mr. Alperin, are we correct, I think Ms. Connors has suggested that this hearing really relates only to one of the three defendants specifically Carmen Reyes?

Mr. Alperin: Correct. That's correct, Judge.

The Court: Okay, this is a hearing on a motion to suppress evidence?

Mr. Alperin: That is correct.

The Court: Is that the only issue?

(3) Mr. Alperin: That's the issue.

Ms. Connors: Yes, Judge.

The Court: Both sides ready?

Ms. Connors: Yes, Judge.

Mr. Alperin: I would like to make an opening statement. I would like the officer to be excused.

The Court: Okay, is the officer in court? We will be right with you.

Mr. Alperin: Your Honor, in this case, I move to suppress the evidence pertaining to all three defendants because I claim that the search warrant was an improper search warrant.

Judge Diaz reviewed the search warrant while he reviewed the statements allegedly made by the informant and ruled that probable cause existed for the issuance of the search warrant and denied my motion as to the suppression of the evidence seized under the warrant except for the evidence seized from the person of the female Carmen Reyes on the grounds that there is an issue of whether the actual seizure of Carmen Reyes was pursuant to that search warrant and whether the search warrant (4) authorized what occurred as to her.

And that's why we are here and I would like your Honor to know ahead of time what my claim is going to be.

Referring specifically to what I perceive the problem with this case is and where the officer's executing the search warrant went wrong, I quote from basically as I understand the officer's testimony is going to be, "They were going to the building to

execute this warrant which was apartment B, 1665 Grand Concourse. There was a female and a male outside the hallway of the apartment outside."

The Court: I don't seem to have the search warrant here.

Mr. Alperin: Well, I had a copy to give to your Honor.

The Court: Where would the search warrant be?

Mr. Alperin: Well, I had to make a motion to open it up. It's one of those that's sealed. They have a thing now they seal, so it was opened for Judge Diaz. Whether he returned it or not, I had a big argument that I was (5) entitled to see it and to evaluate it too. I had to give him a lot of cases, but I just had a copy.

Ms. Connors: I had given it back to you. Judge, I have—this is an extra. This is an extra copy, Judge.

Mr. Alperin: That is the warrant. Now, obviously, that's the authority. Now, attached to that is the affidavits, but I suggest to your Honor that they are not pertinent at this point.

Now, I would continue my claim. Now, there is a female and male seized, physically seized and detained outside the apartment. The officer goes into the apartment. He claims, and they are going to claim, and this is the language, there was a female outside the apartment with another male in the hallway who fit the description of the person that was named in the warrant.

Low and behold, when I studied the warrant, there is no person named in this warrant. This warrant for whatever reason is a warrant solely for

the apartment. It gives no (6) authority to seize or search any person and it's not even the usual language, Judge, any person found therein. Not even in this warrant do they have that.

So the officer says after he secured the apartment and had the two other individuals under arrest, that's the two males, I went to the living room, found a picture of the female that I was looking for, I brought it outside and matched the picture to the female who they had seized, and I had arrested them.

And I think the problem here is it's not that they deliberately did anything so terrible, but they expected and thought that they had a warrant that allowed them to seize people before they seized evidence.

But if you look at the warrant for whatever reason, the Criminal Court judge said apartment B at this premises, and I have showed the district attorney and I give the Court the case of People versus Green, "search warrant which authorized search of named person" and we don't have this. This is Judge Wachtler, Court of Appeals. "The named person other than (7) defendant, of the person of such named invidual, and any other person who might be found therein did not authorize search of defendant's person just beyond the threshold where he was encountered as he was leaving the apartment."

Also, they arrested the defendant nineteen blocks from the apartment and the big discussion in the Court of Appeals was when you have a warrant.

In this case, there was more than one apartment search, one guy arrested nineteen blocks away, one guy arrested coming out of the apartment. Court of Appeals said when you have a search warrant for the apartment you can have only seize and search within the area of that apartment or persons named in the warrant in that apartment. If you search him down the block, it's not part of the warrant.

The Court: I think we are getting ahead of ourselves.

Mr. Alperin: I know, but I want to set the picture now from what I perceive to be my effort to show the officers went beyond the (8) scope of what authority they were given.

The Court: Let me hear testimony.

Mr. Alperin: D.A. can say something too I suppose.

The Court: Do you want to address the issue or just rather rely on the testimony?

Ms. Connors: No, Judge, I rather rely on testimony.

The Court: Of course you will have an opportunity to be heard.

Ms. Connors: Thank you, Judge.

The Court: Call your first witness.

Ms. Connors: People call to the stand Detective Milton Bonilla.

DET. MILTON BONILLA, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

Court Officer: Witness on the stands gives his name Detective Milton Bonilla B-o-n-i-l-l-a, shield number 61, assigned to Manhattan Special Victim Squad, New York City Police Department.

The Court: Proceed, Ms. Connors.

Ms. Connors: Thank you, Judge.

Det. Bonilla—People—Direct

(9) DIRECT EXAMINATION BY MS. CONNORS:

Q. Detective, how long have you been a member of the New York City Police Department? A. About nine and a half years.

Q. And currently where are you assigned? A. Manhattan Special Victim Squad in Manhattan.

Q. Now, Detective, on February 6th, 1992, where were you assigned? A. To the Bronx Narcotics Major Case Unit.

Q. And while you were in the Bronx Narcotics Major Case Unit, approximately how many drug related arrests did you participate in? A. About 450.

Q. Now, Detective, I'd like to call your attention to the date of February 6th, 1992 at about five o'clock in the afternoon at the location of 1665 Grand Concourse which is located here in Bronx County. Were you on duty on that date at that approximate time? A. Yes.

Q. And can you tell us in what capacity you were working? A. I was an investigator to execute a search warrant.

(10) Q. And can you tell us what location the search warrant was for? A. 1665 Grand Concourse apartment B.

Q. Now, did you have occasion to make an arrest or arrests on that date, at that approximate time and location? A. Yes, I made three arrests.

Q. And can you tell us the name of the female that was arrested?

The Court: Do you need something to refresh your recollection?

The Witness: Yes, I do.

The Court: You may look at the paperwork if you have any or if the D.A. has you paperwork. Have him look at his arrest report.

Ms. Connors: Yes.

Judge, at this time I ask this be marked as People's 1 for identification.

The Court: We can deem it marked 1 for identification.

Ms. Connors: Thank you.

(Whereupon, the item referred to is received and deemed marked People's Exhibit 1 for Identification.)

(11) The Court: Examine that.

A. Carmen Reyes.

The Court: Does that refresh your recollection as to who you arrested?

The Witness: Yes.

The Court: The female?

The Witness: Yes.

The Court: And you arrested others besides the female?

The Witness: Yes, I did.

The Court: And who were they?

The Witness: Norman Aponte and Mr. Maldanado.

The Court: Okay, two males?
The Witness: Two males.
The Court: Thank you.

Q. Okay, now, Detective, can you tell us the circumstances leading up to the arrest of Carmen Reyes? A. We were going to execute a no-knock warrant on 1665 Grand Concourse apartment B. As we were entering the hallway of this apartment complex, there was a female and a male standing in the hallway. We secured the female and the male in the hallway so that for our own safety while we were knocking down the door to get (12) into the apartment. She fit the description of an individual that was named on the warrant, a description of the person that was named on the warrant. Once we secured the apartment, I found a photo inside the apartment, came back out and matched it with the female who was outside the apartment.

Q. Now, Detective, why was—when you say the female, you are referring to Carmen Reyes? A. Yes, I am.

Q. Now, why was she detained at all in that hallway? A. Because of our own—for our own safety and for her safety also because usually when it comes to narcotics there is, you know, they go along with weapons and other things of that nature.

Q. Now, Detective, during the execution of a search warrant, is it common for people to be detained for your own safety? A. Yes.

Q. Do you search every individual you detain? A. No, we do not.

Q. Now, I believe you testified you found a photograph in the apartment; is that correct? A. Yes.

(13) Q. Okay, who was that, or after you found that photograph, what, if anything, did you do? A. Okay, I came outside and I put it against the female. We found out that it was her, the

person that had control of the apartment or who lived in the apartment, it was the same person in the photo.

Q. Now, can you tell me or can you please describe what Carmen Reyes looked like on February 6th, 1992? A. She was a female Hispanic, about maybe 5'1, 5'2, approximately olive colored, plus she was wearing glasses and she had maybe a little longer than shoulder length hair.

Q. Approximately what age was the approximate age of the defendant Carmen Reyes? A. Later 50's, early 60's.

Q. Now, when you went to execute the search warrant, were there any descriptions that your were given prior to executing the search warrant?

Mr. Alperin: I object
The Court: No, overruled. You may answer.

A. Okay, in the search warrant, if I'm not mistaken it stated that she was a female Hispanic about in her—50's years old.

(14) Q. Now, is that in the warrant, Detective, or is that in the affidavit? A. That is in the warrant.

Q. It's on the face of the warrant? A. it should be on the warrant, yes. Oh, excuse me, mistake. It was written up in the warrant, but it's not per se of what they typed up the warrant with.

Q. So, in other words, Detective, the warrant—the actual warrant is not contained this description, the description is in the affidavit that was submitted with the warrant? A. Correct.

Q. What did you do with that photograph that you found in the apartment? A. I vouchered it.

Q. And what, if anything, else did you find in the apartment that related to the arrest of Carmen Reyes? A. We also found in the apartment a loaded handgun, we also found in the apartment U.S. currency, some scales, other bags containing

alleged controlled substance, a bottle containing litose (phonetic) marked on it, and I think cellophane paper.

Q. And was there anything else recovered—was there anything else recovered—withdrawn. (15) Do you know who is the rightful lessee of the apartment 1665 Grand Concourse letter B? A. Yes.

Q. And who's that? A. Carmen Reyes.

Q. And was there anything else recovered that helped you ascertain that she was, in fact, the lawfully lessee? A. When we did a search of the apartment, we found letters with her name on it addressed to that apartment with her name on it.

Q. And what did you do with those letters? A. We also vouchered those letters.

Q. Now, Detective, after you found the picture inside the apartment and you matched it with the woman who had been detained for your safety outside the apartment in the hallway, what next happened? A. Well, I placed her under arrest and then I went into the apartment, secured the bathroom, and Detective Bond searched the female.

Q. Now, why did Detective Bond search Carmen Reyes instead of yourself? A. Because it's police procedure that a female (16) will search another female.

Q. And what, if anything, was recovered as a result of searching Carmen Reyes? A. Two bags of alleged control substance.

Q. And were these recovered from Carmen Reyes' person? A. Yes, they were given to me by Detective Bond.

Q. And after you got the two bags of alleged cocaine form Detective Bon, what did you do with them? A. I vouchered them.

Q. Were you present in any way for the search of Carmen Reyes? A. No, I was not.

Q. Now, Detective, do you see the person that you now know to be Carmen Reyes in the courtroom today? A. Yes.

Q. And Could you, please indicate to us where you see her? A. She is sitting next to defense attorney plus an interpreter.

Mr. Alperin: Indicating the defendant, Judge. This is Carmen Reyes.

Ms. Connors: I don't have any further questions for the this witness at this time, (17) Judge.

Det. Bonilla—People—Cross

The Court: Cross-examine.

Mr. Alperin: I would like to offer this as an exhibit, defense exhibit.

The Court: There is one in the court file, but if you want to you can.

Mr. Alperin: I would like to offer to begin my cross-examination the actual warrant signed by Judge Grasso 3:25 p.m. I'm not sure the date.

The Court: it should be on there.

Mr. Alperin: It's '92.

CROSS EXAMINATION BY MR. ALPERIN:

Q. Do you remember when the warrant was signed, what date, Officer? A. No, I couldn't tell you. I have to look at papers.

The Court: Was it executed the same day that it was issued?

The Witness: I don't think so.

The Court: Okay, mark that defendant's exhibit A.

(Whereupon, the item referred to is (18) received and marked Defendants Exhibit A for Identification.)

Q. Officer, that's the warrant you went with? A. Yes, it is.

Q. Are you the officer who secured the warrant? A. Secured the apartment when we left.

Q. No, the warrant itself?

The Court: Retained from the Court?

Q. From the Court? A. Yes.

Q. Are you the officer who made the affidavit for the warrant? A. Yes, I am.

Q. You dealt with the informant? A. Yes, I did.

Q. Okay, is there any reason that you can tell this Court why any person who might have been mentioned in the affidavit is not mentioned in the warrant subject to be searched? A. No, I brought a confidential informant and myself to the Criminal Court in front of the judge and the judge was the one that listened to what the informant said.

Q. When you left with that warrant, did you know (19) that it authorized the search of no individuals, just the apartment, did you know that? A. Search for the apartment, correct.

Q. Without mentioning individuals, any person found therein, or any other person described as Jane Doe, female 50 years old, did you know that it did not contain that? A. Correct. It didn't contain it in this piece of paper. You're right about that.

Q. You say you've been executing warrants for how long? A. While I was—

The Court: He didn't say.

Q. How many warrants have you executed? A. I couldn't tell you off the top of my head.

Q. Twenty-five, fifty? A. Could be. Could be more. I don't know.

Q. Sometimes you get a warrant that says any person found therein? A. Usually we get a warrant for an apartment.

Q. Without naming any individuals? A. Correct.

Q. Okay, so there was nothing unusual in your mind about this warrant? (20) A. Excuse me?

Q. There was nothing unusual about this warrant? A. No.

Q. You treated it like any other warrant? A. Correct.

Q. And it's your habit to stop people in the hallway and hold them while you are executing the warrant? A. For my safety, yes.

Q. Now, when you say for your safety, that means so that these people couldn't do what? A. Attack us while we are concentrating on knocking down the door.

Q. How many officers came to that door? A. I don't remember how many exactly.

Q. There is a way to find out how many, right, there has got to be some? A. There was a field team. I can't specifically say there were so many officers.

The Court: Was it more than two?
The Witness: Sure. Yes, there was.
The Court: Maybe as many as ten?
The Witness: Sure.

Q. Now, in what way is this 50 or 60 year old lady (21) a threat while these, let's use the even number ten, police officers are executing the warrant? Explain to me how this lady who is in the hallway is a threat. A. She is—anyone is a threat because anyone can carry a gun and anybody can pull a trigger.

Q. So that anybody who would be in the hallway when you were executing a warrant would be seized, anybody? A. Not seized, detained.

Q. Well, detained. What does detain mean? A. Held for our safety to make sure they don't attack us while we have our backs turned.

Q. How were these people held? A. Just put to the side in the hallway.

Q. Somebody stays with them? A. Correct.

Q. Keeps them in sort of a way so they can't leave or go any place. A. Correct.

Q. If the lady wanted to leave out of the building, she couldn't actually say I'm going to the store, can I go? A. No.

Q. No. She's not free to go any place this lady? (22) A. No, not at the time, no.

> The Court: If I may?
>
> Mr. Alperin: Yes.
>
> The Court: It would seem to me if you are actually concerned about safety where you are going to execute a search warrant, why not empty out the hallway, have all those people coming down the stairs or trying to enter the building leave the premises?
>
> The Witness: Because of the fact that one of the individuals who might leave the premises might be a person that knows about that apartment and they can get rid of the evidence that we are searching for.

Q. Now, when you seized this lady, you didn't seize her coming out of the apartment? A. No, she was in the hallway.

Q. In the hallway. This is a regular multiple dwelling? A. Yes, it is.

Q. In fact, what floor is this hallway that we are talking about? A. First floor lobby.

(23) Q. On the way outside to the building. She is not like in the hallway standing on the fourth floor or third floor? A. No.

Q. This is the hallway to leave the building? A. the hallway inside the building. Correct.

Q. But the main entrance of the building? A. It's a big lobby area maybe as big as from here to there.

Q. Now, when she was seized at that time, the informant was not with you, right? A. No, he was not.

Q. Nobody pointed her out — A. No, they did not.

Q. —and said, hold her, she is Reyes, or she is the woman from the apartment, or she is the owner, or anything like that? A. No, sir.

Q. She was was just held? A. Correct.

Q. Okay, now, at the point when she was secured or held, the door that you entered was how far away? A. Few feet away.

Q. Okay.

(24) The Court: How many feet away?
The Witness: Few feet away, sir.

Q. It's on the first floor this apartment? A. Correct.

Q. Right. You said another male was held in the hallway? A. Correct.

Q. Anybody who was in the hallway got held? A. It was two individuals yes, a female and a male.

Q. If there would have been five, you would have held five?

The Court: Objection sustained.
Mr. Alperin: All right.

Q. Now, when you entered the apartment, she wasn't released? A. No.

Q. And, in fact, it was some period of time before you went back outside and actually said arrest her? A. Yes.

Q. Didn't happen like that, one, two, three? A. No, we had to secure the apartment.

Q. And you searched the apartment? A. Excuse me?

(25) Q. And you searched the apartment? A. We secured the apartment. We didn't search the apartment. What we did was, we made sure that all the individuals were in the apartment were placed under arrest, okay, for our own safety and that's when I went in and found the photo.

> The Court: Well, tell me something about the matter in which you executed the warrant. What did you do in this case?
>
> The Witness: Okay, we went into the building, we had a ram, we knocked on the door and we got into the apartment. We went into the apartment because we had a description of the apartment and each of us secured a room.

Q. This was a no-knock, nobody opened the door for you and broke the door down? A. Yes.

> The Court: Now, when you say each of us secured a room, even of the members of the team?
>
> The Witness: Field time, yes.
>
> The Court: Weapons drawn?
>
> The Witness: Correct, sir.
>
> The Court: And were individuals in the (26) apartment?
>
> The Witness: Yes, there was two.

The Court: How many?

The Witness: Two.

The Court: And both of these were arrested?

The Witness: Correct.

The Court: Okay, how much time did you say pass between the time that you detained the defendant in this case and the time you actually ramed the door?

The Witness: May a few minutes. By the time we finished everything, a few minutes.

The Court: Okay, how much time then passed between the time that you entered the apartment, secured the rooms and arrested the individuals before you found this photograph?

The Witness: A few minutes, few more minutes, maybe three to four minutes.

The Court: Where did you find the photograph?

The Witness: In the living room.

The Court: Where in the living room?

The Witness: She had like a stand in the (27) living room where they had photos and I saw the photo

The Court: Well, was it visible, did you have to go through drawers?

The Witness: No, it was visible.

The Court: Visible.

Q. Now, were there any drugs found in the apartment? A. There was alleged controlled substance found — that we thought it was alleged controlled substance in the apartment. Yes, there was.

Q. It came back from the lab no drugs, right? A. Correct.

Q. You did find one gun? A. Yes.

Q. In the room you claim in open view, that a Norman Aponte? A. Yes.

Q. And basically remaining in this indictment aside from the drug paraphernalia relating to the apartment is only that one gun, no drugs at all— A. Correct.

Q. —were found in the apartment? A. Correct.

(28) Q. Now, you went out with the picture, and when you got out in the hallway with the picture where was this lady? A. She was still standing in the hallway a few feet from the door.

Q. Was she still in custody? A. Yes, someone was watching her.

Q. She was not free to leave the whole time? A. Correct.

Q. And nobody had questioned her at all, right? A. No, sir.

Q. When she was stopped, did anybody ask her where do you live, what are you doing here, or anything like that? A. No, not at that time. No, sir.

Q. And when you went up to her, you had this picture? A. Correct.

Q. And did you question her at that time with the picture in your hand? A. I asked her who she was. Yes.

Q. What do you mean by—what was the question? What exactly do you remember asking her? A. Exactly remember? I can't remember exact (29) words, but I asked her her name.

Q. Before you asked her, did you tell her that she had a right not to talk to you, any kind of warning so to speak, the little ones off the card, the Miranda cards? A. I wasn't interrogating her, I was trying to get her pedigree.

Q. Was there some question in your mind whether this was the same lady? A. There was not a question in my mind. I had the photo right in front of me.

Q. What I'm saying, well, then whether she answered she was so and so and lived upstairs in the roof wouldn't made any

difference? A. No, because I would have tried to verify who she was.

Q. So you were questioning her? A. No, I wasn't. She told me her name.

Q. Well, did you have the envelope at that time also as well as the picture? A. No, at that time I did not.

Q. So the picture didn't mean a name to you, did it? A. No. (30) Q. So even if she said my name was Barbara Streisan, what difference would that make?

The Court: Objection sustained.

Officer, at the time that you compared the photo to the defendant and saw there was similarity, I take it, correct —

The Witness: Correct.

The Court: —did you have the name of this defendant in any of your paperwork? In other words, it doesn't appear in the search warrant, you agree with that?

The Witness: Not exactly.

The Court: Did it appear in the affidavit, if you know?

The Witness: No, I don't know. It wasn't in the affidavit for the warrant.

The Court: When you went to that apartment B at 1665 Grand Concourse, were you looking to apprehend, or search, or to seize a Carmen Reyes in any way?

The Witness: No, sir.

The Court: Okay, thank you.

Q. Okay, Officer, I ask you now about certain Grand Jury testimony that you gave, it looks like just (31) October 21, 1993 just about a week ago or so. And I'm going to read a question

and then I'm going to read your answer and ask you about that. Okay, on page 8 the question was:

> "Question: Now, could you, please tell us the circumstances leading up to the arrest of Carmen Reyes?
>
> "Answer: As we were going in the building to execute a warrant on apartment B at 1665 Grand Concourse, there was a female outside the apartment with another male in the hallway who fit the description of the person that was named in the warrant. After we secured the apartment and had the two other individuals under arrest, I went to the living room and found a picture of the female that I was looking for. I brought it outside, I matched the picture to the female who fit the description. At that time, I placed her under arrest."

Q. Did you give that answer?

The Court: Did you give that answer?

A. Yes, I did, sir.

Q. In that answer it appears to me that you're not (32) saying she was stopped and held for your safety so that —

The Court: Objection sustained.
Ms. Connors: Objection, Judge.
Mr. Alperin: Okay.

Q. When you stated that there was a female who fit the description when you put that in your answer, is it that you are trying to say that's the reason why she was held in the hall?

Ms. Connors: Objection, Judge.

The Court: Overruled. It's a valid question.

A. Excuse me?

The Court: When you said -- when you said that, that is your answer, right?

The Witness: Right.

The Court: And in the answer you seem to say or you do say that the female in the hallway fit the description of the person named in the search warrant. Now, one, we know that no one was named in the search warrant so that was an error I take it?

The Witness: Correct.

The Court: When you say she fit the (33) description, what did you mean by that, what description did she fit?

The Witness: When the warrant was drawn up, before it goes to the judge and typed up this way, what happens is there is a description of individuals who the confidential informant says might be in the apartment and that's where I got that description from.

The Court: Where is that now? When you are talking when the warrant was drawn up, does that description appear in the affidavit?

The Witness: Yes, it does.

The Court: Okay.

Q. Now, Officer, I direct your attention to your Grand Jury testimony back in probably in February of '92 and I ask you if you asked this question and given this answer.

"Question: In what capacity were you working?

"Answer: We were executing a search warrant into the apartment.

"Question: Can you tell the circumstances for that warrant and what happened as a result of the search warrant?"

(34) This is the answer you gave.

"Answer: From the judge we had gotten a search warrant for 1665 Grand Concourse apartment B. As we were going into the apartment building, there was a male and female. The female who fit the description we detained her for a minute while knocking on the door and execute the search warrant."

Q. Is that your answer back in February '92? A. Yes, sir.

Q. There is nothing in there about detaining her for your safety? A. That is true.

The Court: It speaks for itself the answer.

Q. Now, when you came into that building, however, many officers that came in rushed into the building; is that correct? A. Yes, sir.

Q. Now, when this male and female were in the hallway, they weren't just calmly detained, were they? There was a lot of excitement, there might have been a gun put to their head and they were told to go against a wall, something like that, Officer? (35) A. I don't recall that, sir.

Q. Well, you got to put yourself in this position of these officers entering 1665 Grand Councourse running into the building because you are not going to take your time to get in

there so people could see you, right, you go in this building as quick as you can, right? A. Correct.

Q. And would it be fair to say that the way she was detained was somewhat forceful and excitable? I'm trying to use terms --

Ms. Connors: Objection, Judge.

The Court: It's unimportant. It's irrelevant if she is detained unlawfully. The fact that she is detained forcefully, unlawfully is irrelevant.

Mr. Alperin: Well, I would suggest that I just read the First Department on a case Judge Bamberger had about the police and they talked about it's not only your right to conduct the search, but the way you do it that has some reflection on the due process rights of people, and that there are some —

The Court: I don't agree with that, Mr. Alperin. He went in there with guns drawn and (36) she was detained with guns drawn. Whether they pointed a gun at her, that's really irrelevant.

Mr. Alperin: I have no further questions of the officer.

The Court: Okay, Ms. Connors.

Ms. Connors: Judge, I don't have any further questions either.

The Court: Thank you. You may step down.

All right, what time tomorrow?

Ms. Connors: Whatever time is convenient for you, Judge.

The Court: Well, I will be here all day. I think you are the ones who have more problems than I do.

Mr. Alperin: I have a nonjury with this district attorney bringing a witness in the morning in front of Judge Mazur to continue a trial.

Mr. Booth: This being Christopher Booth for the record.

The Court: Why don't we coordinate that? I will speak to Judge Mazur needless to say.

Mr. Alperin: I'll be in the building by ten o'clock tomorrow. I will come here with (36A) these three defendants and we will work it out.

The Court: Okay, we will see you tomorrow.

Ms. Connors: Thank you, Judge.

(Whereupon, Court is recessed and the case is adjourned to November 5, 1993.)

* * *

PROCEEDINGS

(37) SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 31

THE PEOPLE OF THE STATE OF NEW YORK

against

CARMEN REYES,

Defendant.

INDICTMENT #7388/93
CONT'D HEARING

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851 Grand Concourse
Bronx, New York
November 4, 1993

BEFORE:
HONORABLE LAWRENCE TONETTI,
Justice.

APPEARANCES: (Same as previously noted.)

(Whereupon, the following takes place in open Court in the presence of the Court, Defense Counsel, the Assistant District Attorney, Official Spanish Interpreter and the Defendant.)

Court Clerk: Hearing continued, People of the State of New York versus Carmen Reyes.

Note for the record all parties are present at this time including our Spanish interpreter.

The Court: Okay, yesterday this Court (38) commenced a hearing, a motion to suppress evidence seized from the person of the defendant Carmen Reyes and her testimony from Detective Milton Bonilla.

Counsel for the defense in his opening remarks highlighted the issue for the Court with respect to the contention. The officer in question here had a search warrant and on with the search warrant for the apartment—

Mr. Alperin: Is this a decision or just a review?

The Court: I will bring us up to date.

Mr. Alperin: Oh, okay.

The Court:—on with the search warrant went to the apartment, and in the hallway of that building saw the defendant in this case. In order to secure the safety of the officers involved in the execution of the search warrant, detained her in the lobby of that building and subsequently placed her under arrest.

The People rest?

Ms. Connors: Yes, Judge.

The Court: That's the People's case on (39) the motion.

Mr. Alperin: Judge, just for the record, I would ask that the evidence seized be admitted as part of this hearing. I don't think we actually admitted the evidence as part of this hearing.

The Court: this is the subject matter of the hearing. I don't know that we have to add this necessarily. I suppose you do, but there are what, two packets of cocaine?

Ms. Connors: Yes, Judge. There are two packages, clear plastic bags containing cocaine.

The Court: We will call that People's —

Mr. Alperin: That will be People's 1 because I put in the warrant.

The Court: She put in something for People's 1.

Ms. Connors: Yes, Judge. This will be People's 2. I put the identification of the police report.

The Court: So there are the two packets of cocaine seized from this defendant; is that correct? (40) Ms. Connors: Yes, Judge.

The Court: Okay, that is the subject of this hearing, those two packages of cocaine. They would be received for the purposes of the hearing and considered on the motion.

Defense.

Mr. Alperin: Defense rests.

The Court: Both sides rests. I will hear any further argument you wish to make.

Mr. Alperin: I would like to discuss the case that I mentioned to the Court on my opening which I think is the pertinent case to the issues in this hearing. That's People versus Green, 33 New York 2d 496 speaks — I'm not going to get into what it says because the Court read it. I gave a copy to the D.A. I'm sure she will read it. Let me go after the case and see whether certain the evidence in this case either strengthens my position or weakens it.

To begin, I believe that the warrant here which authorizes just a search of the apartment and not even any person found therein, or there at, or any named person, or any described (41) person makes my case even stronger because the warrant in Green

or the warrants in Green plural had the notations on them and any other person who might be found therein and also named the certain person and described a certain person. This warrant is even less than authority to do what the police did. That might be argued from the Green case, so I think that fact in this case strengthens my argument.

Now, let me go to another argument that I see that the People might make. And I hope I'm not being presumptious in making something for them that they don't deserve themselves, but my client really was not searched until after the search of the apartment.

Now, what does that mean? Well, she was obviously seized in custody one hundred percent because not even after they were in the apartment was she let go. So if they talk about their safety and if you accept that which I don't think you should, surely, once they break into the apartment and they are there she can be released, but obviously she was continuously held until the officer inside made (42) certain observations which he claimed would connect her with the apartment. And then he questioned her while she was in custody.

So I think under that theory if the D.A. wants to argue the search did not occur until after certain evidence was found in the apartment which might justify then going out confronting her and searching her, I don't think that's a good argument either, Judge, because her seizure was illegal. There is absolutely no grounds in this case for her to be seized except the ground offered by the officer, something to do with this safety.

I suggest that based on what he testified in both Grand Jury proceedings that's a spurious issue here, safety. It's not the real reason why she was seized. The reason she was seized which should be obvious to the Court was that when he entered he saw this elderly lady and decided based on what he was told by an informant, not that anything that he ever observed, because the affidavit is mentioned here but not part of this hearing. Nobody put that in, but he did talk about it. He said (43) that his informant gave him information about an older woman. So as he goes into the hallway here in his Grand Jury testimony he says, "I said hold her." In his mind, because she matched the description that he had. At that point, that is the sole reason for holding her, not safety. That cannot be, and I don't think from my observation that you accepted that. But that is not a good enough reason to hold her until the search is completely conducted inside. They come out and arrested her or searched her.

So I suggest even if the D.A. was to argue she wasn't searched until after the warrant was executed, that you have to go back to the Dunaway issue that she was grabbed without probable cause and held. That permeates everything that happened, so I don't see anything in the facts of the case that weakens my argument as to the holding in the Green case applying here.

Ms. Connors: Judge, in this case, there are a few issues that need to be decided. The first is was the detaining of Carmen Reyes (44) lawfully? And within that is why was Carmen Reyes detained?

Now, the detective in this case testified before you that she and another individual who was inside that hallway at the time they entered to execute the warrant, both those individuals were detained for the safety of the team that was executing the warrant.

Judge, if the detective had just focused in on Carmen Reyes or on that woman in the hallway that day simply because he thought she was the person that matched the description he knew of by way of an affidavit, I submit to you that other individual, a male, would have been let go. If the safety feature was just made up by this detective for this hearing, why hold that other individual, Judge? It doesn't make any sense.

The Court: Ms. Connors, let me ask you. If Robert Johnson happened to live in that building and he happened to have the misfortune of leaving the building at the approximate time that these officers had arrived there to execute the search warrant, you're saying they (45) would have been justified in detaining him in the lobby?

Ms. Connors: Judge, I think if Robert Johnson was leaving his building at the time that they were coming in to execute a warrant, if he was unlikely enough he would have been detained.

Now, Judge, if the detectives had no —

The Court: I have no doubt that he would have been. The question is would they have been justified in detaining? Him. That is what I'm asking.

Ms. Connors: For their safety, Judge. If they were acting on that, yes, Judge, they would have been justified in stopping even Robert Johnson.

The Court: I compliment you. Your argument is consistent.

Ms. Connors: Thank you, Judge.

We have to look further. Is it reasonable for these officers and detectives to feel their safety is something they should be watching out for while executing a search warrant?

And, Judge, I submit to you it is a (46) reasonable thing for them to worry about the fact there are two, three, ten, fifteen people standing around who can either warn the target apartment of what's going on and that can result in distruction of evidence, or injury, or death to a police officer, or innocent bystander.

And number two, Judge, the other reason it's reasonable for them to stop people in the hallway is they kind of rough in. This isn't a situation, Judge, where they walk in nicely and say oh, who are you? You can go. Oh, it's more like it's happening all at once and if they allow a person to kind of walk out because they are going to the store and they are not involved in this that person could, in fact, have a gun on them and could, in fact, turn around and injure a police officer.

So their safety in this kind of situation, Judge, where there are drugs many times there are guns involved also. I think it's reasonable and I think the detective displayed to you that that he thought it was reasonable for himself and members of the field team to (47) worry about their safety in this case.

And, Judge, if you look at the facts in this case there was a gun. Luckily Carmen Reyes did not have it on her. It was in her apartment and it was loaded.

So where there are drugs generally there are guns. Kind of goes along with this case in a way, Judge.

What if that other individual that day had had a gun on him, the other man that was standing in the hallway, and they let him go and he turned around and did something? Well, we could use the same argument for Carmen Reyes in this case. I'm not suggesting that's what happened here, Judge, but if she had not been detained she had a few choices that she could have done. She could have walked away nicely and not said anything. She could have warned the other two gentlemen who were arrested in this case. Listen, the cops are out here. Oh, my God, whatever, one of them could have used that gun. Judge, so there was a gun in this case.

Now, Judge, the case that Mr. Alperin referred to, People v. Green case, in that case (48) there was a warrant for the search of an apartment and any persons therein. And in that case it seems to me what the detectives did was take that search warrant and walk nineteen blocks away and then stop a person who may have been in that apartment nineteen blocks away.

The Court: If you recall the testimony, Ms. Connors, a little stronger than that. The officer testified — this was acceptable by Court of appeals—as the record indicates, that the person was seen leaving the apartment and they could have obviously stopped him immediately in the hallway. They chose not to. They followed him a distance before they did stop him and search.

That seems to be a stronger case to me than this one because this lady was not seen coming out of

the apartment, yet that guy was seen coming out of the apartment. The Court suppressed.

Ms. Connors: But, Judge, that is if you accept defense theory that she was stopped because of the search warrant.

It's the People's position, Judge, that (49) what happened to Carmen Reyes was she was unlucky enough to be standing in that hallway when the police came in to execute their warrant. She was detained for their safety. She was further unlucky enough to have a photograph of herself inside her apartment which the detective found after he entered that apartment. She was further unlucky enough to have this particular detective have a description in his mind from an informant in this case. We can't get rid of that description, Judge. There is no way that the detective can just say okay, I'm going to forget about that description, it's not in the warrant —

The Court: Well —

Ms. Connors: —I'm going to forget it.

The Court: With all due respect, the description that he had was of a female Hispanic in her fifties.

Ms. Connors: Yes, Judge.

The Court: That's it.

Ms. Connors: That was all that he knew. That was the only description he had.

(50) The Court: I would suggest to you that's a rather broad description.

Ms. Connors: Yes, Judge, but combining that with — well, then, Judge, it that's true that the description is rather weak, then perhaps the detective didn't have her detained because she matched

the description. Maybe he did have have her detained because of his safety and then matching that description with the photograph, Judge.

The Court: Well, which is it? Do you want them both or one or the other?

Ms. Connors: Judge, I want what the detective testified to which was he had this description in his mind. He had a photograph in the apartment. That photograph went along with his description and also matched the lady standing outside of this apartment a few feet.

The Court: I'll tell you now very clearly, Ms. Connors, that if this woman was in the apartment and the officer saw her photograph in the apartment and placed her under arrest in the apartment, you can have a valid seizure. That's not what happened. (51) Ms. Connors: No, Judge, that's not what happened.

The Court: The photo that he sees subsequently can't undue the wrong doing that occurred prior thereto if there was wrong doing, so you are stuck with once again the safety argument if —

Ms. Connors: Exactly, Judge.

The Court: Okay.

Ms. Connors: And it's the People's position with that safety argument that the detective testified when I asked him if he has done this in the past while executing a search warrant freezing people until they get in and secure whoever is inside the apartment, his response was yes, we do that as a matter of course because of our safety, there is just too many people for us to watch.

So, Judge, I ask you to judge the credibility of the witness and you need to determine if, in fact, Ms. Reyes was detained for safety purposes. Thank you, Judge.

The Court: Okay, this Court took (52) testimony from the one witness and one witness only and that was Detective Milton Bonilla who testified that he had been a police officer for some ten years, and that he was working in Bronx Narcotics back on February 6, 1992, and that at approximately 5:00 p.m. of that date he together with a team that may have been as many as ten, possibly more according to his testimony, went to an address at 1665 Grand Concourse in order to execute a no-knock search warrant for apartment B which was on the ground level, the lobby level of that particular building. That when he entered the building he saw this defendant Carmen Reyes together with another male in the hallway, that both of these individuals, the defendant and the other was secured, I think, was the exact terminology used by detective Bonilla. Later on he amplified to mean that they were detained for the safety of the police officers and that this detention took place prior to the police entering the apartment pursuant to the search warrant. They entered the apartment with a battering ram knocking down the door. Inside (53) that apartment two other individuals were arrested together with paraphernalia involving drugs and a loaded pistol ammunition. They also found inside that apartment a photograph of this defendant, a photograph of a female Hispanic. The police officer took the photo outside, compared it to the defendant, found it to be a match and then placed the defendant

under arrest. She was subsequently searched and two bags of cocaine were recovered from the defendant which are the subject matter of the motion to suppress.

The search warrant was introduced into evidence as defendant's exhibit A and the search warrant clearly shows or indicates that no individual was named in that search warrant which is rather unusual I suggest. I've seen hundreds of search warrants and they all offer a specific premise and for a specific individual in that premise and any other individuals found to be on said premises.

This defendant, as I say, was detained according to the officer in round numbers about ten minutes, I would say, from the time she was (54) first found in the hallway until the officer came out with a photograph and subsequently placed her under arrest.

I first and foremost I want to make a finding of fact that I find the testimony of Detective Bonilla to be most refreshing in its honesty and candor in every respect so that there isn't any question in my mind that Detective Bonilla told the truth. He did not try to stretch the truth in any way. He said that he had a confidential informant he had used — whom he had used to obtain the search warrant. And the quantum of information was that there was drugs in that apartment, and that drugs were being sold in that apartment, and there was a female Hispanic in her fifties in that apartment. She was not named by the confidential informant, nor did her name appear anywhere on the search warrant, and nor was she seen coming out of the apartment.

The case that we have been talking about, both defense and prosecution, is People v. Green decided 33 New York 2d 496 somewhere I think in 1976 or so with Judge Wachtler writing (55) the majority of the opinion.

In that case, an individual was seen leaving the apartment and, of course, the police followed him as the D.A. pointed him out some nineteen blocks before they stopped him and placed him under arrest. The Court of appeals said that was a bad search, bad seizure, that the search warrant justified executing that warrant in that apartment and not searching people outside the apartment.

Well, the district attorney has come up with a novel argument and I compliment her for a good judgment and for her legal argument.

The suggestion is made that the police officers in this case secured the persons of individuals in that hallway and that they secured them for their own safety. I questioned Bonilla myself about that and he indicated that the search warrant executions are a dangerous business and that had he just allowed the female and the other individual to walk out several things could have happened. They could have been armed with weapons and turned those weapons against the police (56) officers. They could have warned the individuals that were inside the apartment that the police were outside and for those reasons they were detained.

And that this Court should recognize and acknowledge that detention as being a proper precaution for the police to exercise. And after all, it was only ten minutes. And the subsequent search of the

apartment revealed a photo of this defendant as the lessee of said apartment and that she was justifiably placed under arrest at that point, and that this search should be recognized and accepted by the Court as a search incidental to a lawfully arrest.

There is another case decided by the Court of Appeals a few years later in 1983. I will give you the cite. It's People v. Sanin S-a-n-i-n. It's on page -- it's in 60 New York 2d page 575. Again, Court of Appeals memorandum, a decision. In this particular case, a warrant was issued authorizing the search of the defendant's apartment of the person of the defendant and of any other person (57) found inside the apartment.

As I've indicated a few moments ago, that is the traditional search warrant that this Court is most familiar with. It authorizes a search of an apartment, the person of the defendant, and any other person found therein. In this particular case as the police officers arrived to execute their search warrant, the defendant was seen driving up to his house, driving up to the garage and the police stopped him in the driveway, and they searched him in the driveway to his apartment.

The Court recognizes this as a valid search on the grounds that the search warrant was for the apartment and the activities of the defendant inside that apartment having been set forth in the warrant. The warrant should be interpreted according to the Court of Appeals as authorizing a personal search of defendant as he approached said apartment and, therefore, he was properly searched in the driveway.

Now, the distinction in that case is a very clear one and that is this was a named defendant. Carmen Reyes was not named in the (58) search warrant in this case. It seems to me that the principles both in Green and in this case as articulated by the Court of Appeals would preclude the justification for a search outside the apartment of this defendant.

With respect to the argument of personal safety, I for one are very much concerned about the safety of a police officer. They got a very tough job and I agree with the D.A.'s contention. It's a well documented contention that where there are drugs there are usually guns. In this particular case proves the theory, a gun, a loaded gun was, in fact, recovered in the apartment.

However, there are many other things that the police could have done in order to insure their safety. It seems to me first and foremost that Carmen Reyes should have been escorted outside the building. She should not have been detained in the hallway. No one really pressed her as to where she was taken, whether she was secured in some crevice or under some stairwell. I don't think that's very clear from the facts. She could have very (59) readily been taken outside by the police officer.

Or two, seems to me, I don't know what they expected to find in that apartment that required the presence of at least ten police officers, but I'm concerned for our safey. As a judge I must be. That argument that I made to you was not a facetious one. I could very well have been resided in that building as well as the district attorney of Bronx County and it seems to me that we as citizens should not have

been put to the dignity, and I think a violation of our constitutional rights of being detained in the manner in which this lady was detained because the police were there to execute a proper search warrant. We have rights and that's what this country is all about. It seems to me that when the police detained Ms. Reyes depriving her right to leave that building and deprive her of her freedom for some ten minutes that that violated the constitutional rights. And the fact that they did it in order to justify their welfare doesn't change the violation of my judgment. (60) What it does, is that they execute or they exercise rather good judgment in protecting themselves, but good judgment to protecting themselves does not justify violation of the constitutional rights of our citizen.

A similar example. Let's assume now it's four o'clock in the morning and the police are on routine patrol and they see a defendant lurking outside the bar and they know it's closing time, whatever closing time may be, twelve or three o'clock in the morning. I think varies from Friday to Saturday night. It's been some time I closed down bars. Let's assume that based on their experience they smell -- and I believe that police officers do have intuition when it comes to this sort of thing -- that intuition hasn't been recognized by our courts as a valid justification for a seizure or a search, but they smell what this guy lurking outside that bar at three o'clock in the morning when it's closing time, maybe even peered in there once or twice to see if the bar was getting ready to close, and they go up to him, put him up against the wall and (61) search him.

And what do they find? A loaded gun which justifies what their intuition told him that he was up to no good, he was waiting for that guy to come out and rob him of the nights proceeds. That's a bad search. Why? It's a bad search because the police didn't have—didn't have any probable cause to believe that he was going to commit that crime. They had lots of suspicion.

Those cases don't come to court this way because what happens, the police officer knowing what the Supreme Court of the United States did in Mapp against Oheyo (Phonetic) did testify in addition to Mr. Suspicion they saw the defendant make some further motion to his left side and then saw what looked like a gun sticking out of his wasteband which will then give rise to probable cause.

At any rate, what I'm saying is that I find that the constitutional rights of Carmen Reyes were violated and her detention and seizure even though it be it for the safety and welfare of the police officers.

Accordingly, the motion to suppress is (62) granted. I think the People have a right to a thirty day hiatus here to order the minutes, review the transcript, the case law, take it up to their appeals bureau and make a determination as to whether or not they seek to take appeal from this decision.

So can we agree upon a time, a date? Today is November the 5th. So we giving them their full time, I think, brings us to December the 6th.

Mr. Alperin: Is that a Monday?

The Court: It is.

Mr. Alperin: I am going to be flying in that Monday from a short vacation so a better day.

The Court: We will give you December the 8.

Mr. Alperin: That's a better day.

The Court: Okay.

Mr. Alperin: It's a Wednesday.

The Court: December 8.

Do you want to go back to the part for where you came Judge Diaz?

Mr. Alperin: Okay 43.

(63) The Court: I don't really care.

Mr. Alperin: 43.

The Court: Okay, so this case is returned to that part..

Motion to suppress is granted and Judge Diaz will take it from here.

Ms. Connors: Okay, thank you, Judge.

The Court: You welcome.

(Whereupon, the hearing is over and Court is recessed and the case is adjourned to December 8, 1993.)

* * *

Certified to be true and accurate of my stenographic notes.

_____

FRANCENE JACOBS
SR. COURT REPORTER

APPENDIX D

Order of the Supreme Court of the State of New York, Bronx County

At a term of the Supreme Court of the
State of New York, Bronx County, Part 31

PRESENT: Hon. Lawrence Tonetti

THE PEOPLE OF THE STATE OF NEW YORK,

against

CARMEN REYES,

Defendant.

ORDER
Ind. No. 7388/93

Upon hearing Lewis Alperin, Esq. for the Defendant, and Lori Connors, Esq. for the People, it is hereby ORDERED and ADJUDGED, in accordance with the court's oral decision of November 5, 1993, that Defendant's motion to suppress physical evidence, two bags of cocaine, is GRANTED.

ENTER.

Dated: Bronx, New York
December 3, 1993

s/Lawrence Tonetti
HON. LAWRENCE
TONETTI, J.S.C.

FILED
MAY 25 1995
OFFICE OF THE CLERK

THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1786

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

V

CARMEN REYES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION FIRST DEPARTMENT

BRIEF OF RESPONDENT IN OPPOSITION

JOHN H. WILSON, ESQ.
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Dated: New York, New York
May 18th, 1995

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QUESTIONS PRESENTED

I

Whether a federal question is presented by this petition in light of the fact that the decision below was properly based on New York State Law; and

II

Whether, under New York State Law, in searching respondent in the lobby outside the subject apartment, the police exceeded their grant of authority, as reflected in the search warrant for 1665 Grand Concourse, Apartment B.

No. 94-1786

In the

Supreme Court of the United States

October Term, 1994

THE PEOPLE OF THE STATE OF NEW YORK

Petitioner

vs.

CARMEN REYES

Respondent.

On petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, CARMEN REYES, respectfully requests that this Court deny the petition for Writ of Certiorari submitted by Petitioner, THE PEOPLE OF THE STATE OF NEW YORK.

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department affirmed the order of the Supreme Court, Bronx County, which granted defendant - respondent's motion to suppress physical evidence as the residential search warrant did not name defendant, nor did the police observe any connection between defendant and the premises in question. Additionally, the police were not justified in the interest of safety in executing the warrant, in detaining defendant after the search warrant was, in fact, executed. The Order of the Supreme Court of the State of New York, Bronx County, dated December 3, 1993, is reproduced in THE PEOPLE OF THE STATE OF NEW YORK'S petition for Certiorari (App. D, 59).

Opinion of the Supreme Court of the State of New York, Appellate Division, First Department, People v. Carmen Reyes, A.D.2d (1st Dept. 1994), slip op. 12/22/94, and the Order of the New York Court of Appeals denying leave to appeal, People v. Carmen Reyes, N.Y.2d (1995) decided on January 31, 1995, are reproduced in THE PEOPLE OF THE STATE OF NEW YORK'S petition for Certiorari. (App. A and B, 11-14).

STATEMENT OF JURISDICTION

Respondent disputes that this court has jurisdiction to review this petition under 28 U.S.C. Sec. 1257(3) as argued in the reasons for denying the writ.

STATEMENT OF THE CASE

On October 8th, 1993, Respondent was indicted by the Grand Jury of Bronx County for Criminal Possession of a Controlled Substance in the Second Degree, and related charges. By an Omnibus Motion dated December 8th, 1992, Respondent's trial counsel requested a hearing to consider suppression of physical evidence and property seized from the person of Respondent at the time of her arrest. In said motion, trial counsel specifically stated that "the defendants were forcibly seized and searched, in violation of their state and federal Constitutional rights." See Record on Appeal, p. 21-22. (emphasis added).

Pursuant to said motion, a hearing was held before the Honorable Lawrence Tonetti, JSC, on November 4th, 1993. The only issue at said hearing was whether or not a quantity of cocaine seized from the person of Respondent should be suppressed. (Petitioner's Writ of Certiorari, App. C, 16-17). In framing this issue for the Court, trial counsel noted that his motion to suppress the property seized from Apartment B of 1665 Grand Concourse had been denied, "except for the evidence seized from the person of (Respondent) on the grounds that there is an issue of whether the actual seizure of (Respondent) was pursuant to that search warrant and whether the search warrant authorized what

occurred as to her." (Petitioner's Writ of Certiorari, App. C, 17).

The People's only witness was Detective Milton Bonilla (Petitioner's Writ of Certiorari, App. C, 20). The detective testified that on February 6, 1992, at approximately 5 PM, he was part of a team of approximately 10 or more police officers (Petitioner's Writ of Certiorari, App. C, 28) that executed a search warrant for Apartment B of 1665 Grand Concourse, Bronx, New York (Petitioner's Writ of Certiorari, App. C, 21). It should be noted that the warrant does not provide for the arrest of any individuals, only for the search of the premises (Petitioner's Writ of Certiorari, App. C, 27).

Detective Bonilla testified that as they entered the lobby of 1665 Grand Concourse, he observed a female and a male standing there (Petitioner's Writ of Certiorari, App. C, 23, 29). These two individuals were detained as the team executed the warrant (Record on Appeal 11-12). In his testimony in the Grand Jury, Detective Bonilla twice stated that Respondent was detained due to her resemblance to a description he had received of the owner of the apartment (Petitioner's Writ of Certiorari, App. C, 35-36). See, also, Affidavit in Support of Warrant Application, Record on Appeal p. 16 ("They had been allowed into the apartment by a hispanic woman approximately 50 years old.").

At the suppression hearing, for the first time, Detective Bonilla claimed that the two individuals had been detained "for our own safety." (Petitioner's Writ of Certiorari, App. C, 23). The Detective went on to explain that his concern was that the people

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may "attack us while we are concentrating on knocking down the door" (Petitioner's Writ of Certiorari, App. C, 28). He further explained that the individuals detained are not free to leave (Petitioner's writ of certiorari, App. C, 29) for fear that they may warn someone in the apartment about the impending warrant execution (Petitioner's Writ of Certiorari, App. C, 29). Upon cross-examination, Detective Bonilla did admit that he was aware that Respondent matched the vague description of the owner of the apartment at the time he had her detained (Petitioner's writ of Certiorari, App. C, 35-36).

After executing the warrant, the detective located a picture of Respondent in the apartment. He then went back to the lobby with the photo and asked Respondent to identify herself. (Petitioner's Writ of Certiorari, App. C., 33). When she gave her name, Respondent was placed under arrest and searched (Petitioner's Writ of Certiorari, App. C, 25). A quantity of cocaine was then recovered from the person of Respondent (Petitioner's Writ of Certiorari, App. C, 25).

The hearing court ruled that the property seized from Respondent's person should be suppressed. "It seems to me that the principles...articulated by the Court of Appeals would preclude the justification for a search outside the apartment of this defendant." (Petitioner's Writ of Certiorari, App. C, 54). The Court also made reference to the fact that it believed Respondent's "constitutional rights" had been violated (Petitioner's Writ of Certiorari, App. C, 56), without specifying whether the Court believed the police actions in the instant case were a violation of

the New York State Constitution, Federal Constitution or both.

The Petitioner, THE PEOPLE OF THE STATE OF NEW YORK, appealed the decision granting the motion to suppress physical evidence as well as dismissal of the People's case against Respondent to the Supreme Court of the State of New York, Appellate Division, First Department. On December 22, 1994, the Appellate Division, First Department, affirmed the order of the Supreme Court, Bronx County (Tonetti, J.), which granted the respondent's motion to suppress physical evidence.

Petitioner, THE PEOPLE OF THE STATE OF NEW YORK, sought permission to appeal the order of the Appellate Division, First Department to the State of New York Court of Appeals said permission to appeal was denied by the Court of Appeals on January 31, 1995.

The instant appeal ensued on the motion of the People.

SUMMARY OF THE ARGUMENT

There is no federal question presented by the instant petition in that the decision below was based on New York State Law. The continued detention of Respondent was illegal and clearly a violation of the Respondent's rights under the New York State Constitution.

Further, under New York State Law, in searching Respondent in the lobby outside the subject apartment, the police exceeded their grant of authority as reflected in the search warrant for 1665 Grand Concourse, Apartment B.

The lower court correctly suppressed the drugs at issue based

on a precedent established by the New York Court of Appeals which prohibits a search of defendant without proper authority.

REASONS FOR DENYING THE WRIT

I

THERE IS NO FEDERAL QUESTION PRESENTED BY THE INSTANT PETITION IN THAT THE DECISION BELOW WAS BASED ON NEW YORK STATE LAW.

Petitioner herein urges this court to find that based upon federal interpretations of the United States Constitution, the Respondent herein was properly detained while her apartment was searched. No such interpretation is necessary under the facts of the present case.

The hearing court determined that under New York State's Law, the search of the Respondent was illegal as the State constitutional rights of the respondent were violated. (Petitioner's Writ of Certiorari, App. C, 56). The Supreme Court of New York, Appellate Division, First Department unanimously affirmed the hearing courts grant of Respondent's motion to suppress physical evidence. However, Petitioner asserts that Respondent was properly seized for "safety reasons" while her apartment was searched. Further, Petitioner asserts that the hearing court found that under the Federal Constitution, said seizure of Respondent was in violation of her federal constitutional rights. To this ruling, Petitioner ascribes error.

Petitioner is under the mistaken impression that merely because the hearing court mentioned the safety concerns of the police in detaining respondent, and because the court made an off-hand reference to a violation of Respondent's "Constitutional" rights ("we have rights and that's what this country is all about") (Petitioner's Writ of Certiorari, App. C, 55), the hearing court

supposedly based its decision on the said violation of Respondent's Federal Constitutional rights.

While it is true that the court repeatedly referenced "constitutional" rights in finding that Respondent's detention had been illegal (Petitioner's Writ of Certiorari, App. C, 55-56), it is crucial to note that the court made its ruling based upon New York State Law. There was no reference made to Federal Law at any time in the hearing court's opinion.

The hearing court referenced the New York State Court of Appeals decisions in People v. Green, 33 NY2d 496 (1974) and discussed the Court of Appeals decision in People v. Sanin, 60 NY2d 575 (1983)*. The hearing court then went on to discuss a violation of Respondent's constitutional rights by her continued incarceration during the search of Apartment B. It is clear from the context of the entire decision that the hearing court based its decision on State Law, not federal. As such, respondent disputes that this Court has jurisdiction to review this petition under 28 U.S.C. Sec. 1257(3) as argued by Petitioner.

Further, Respondent had moved for suppression of the evidence under both the federal and state constitutions (Record on Appeal, p. 22). If this court couples this fact with the plain language of the hearing court's decision, it is obvious that Federal Law was not the basis for the hearing court's decision.

The crux of the Petitioners argument on the State Court Appellate level was premised upon this Court's decision in Michigan

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* Green and Sanin will be discussed in more detail in the second point of the instant brief.

v Summers, 452 US 692 (1981). In Summers, the defendant was detained as he was leaving his apartment, brought back inside by the police, held as the apartment was searched, and then arrested after the search revealed evidence that connected the defendant to criminal activity at that location.

This Court ruled that such a detention "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant." 452 US at 703. However, a very relevant point was made in Justice Potter Stewart's dissent;

> If the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down. And if the police may seize a person without probable cause in order to "facilitate" the execution of a warrant that did not authorize his arrest, the fundamental principle that the scope of a search and seizure can be justified only by the scope of the underlying warrant has suffered serious damage. There is no authority in this Court for the principle that the police can engage in searches and seizures without probable cause simply because to do so enhances their ability to conduct investigations which may eventually lead to probable cause. See Davis v Mississippi, 394 US 721, 726-727.
>
> 452 US at 709-710.

The hearing court in the instant matter ruled that while the police may have been acting in regards to their personal safety in initially detaining the Respondent, to continue to detain her during the search of her apartment violated her rights. If such a state of affairs is permissible under federal constitutional law as explained in Summers, then the hearing court was no doubt

referencing New York State's Constitution in finding the actions of the police herein illegal.

Petitioner may argue that under New York's Constitutional Law, the Summers decision has been followed to allow forcible detentions for the safety of police officers. However, a review of New York decisions in this field reveals that New York rejects the Summers approach entirely, and has adopted the view held by the Summers dissent.

Petitioner has cited People v Soler, 92 AD2d 280 (1st Dept. 1982) as support for their belief that New York follows the rationale of Summers. However, it is clear from the facts of the Soler case that no such result is intended. Prior to execution of the warrant, the police had conducted extensive surveillance of the premises and observed defendant Soler involved in drug-related activity. While Soler was not named in the warrant, when the warrant was executed, he was found inside the premises.

The New York Supreme Court, Appellate Division: First Department ruled that Soler's detention, search and subsequent arrest were based upon probable cause independent of the warrant being executed at the time of his detention and arrest. This independent probable cause arose before the warrant was executed and was based upon the officer's surveillance. 92 AD2d at 285. This is the reason why the court noted that Soler was not "an innocent bystander" 92 AD2d at 287.

In the present case, the police had not conducted any investigation or surveillance of 1665 Grand Concourse, nor had they established who even owned the premises until after they had

executed the warrant. When the police executed the warrant, according to Detective Bonilla's testimony at the hearing, Respondent was an "innocent bystander" frozen in the lobby for safety reasons. If so, her continued detention during the search was illegal and intrusive under New York State Constitutional Law.

In People v Torres, 74 NY2d 224 (1989), two officers received an anonymous tip that an individual with a white sweater driving a black Eldorado was carrying a handgun. Defendant, who matched the description, was removed from his car and frisked. The officers also seized the defendant's bag from the front seat of the automobile, searched it, and found a revolver.

The People argued that the search of defendant's bag was justified as a safety precaution and cited the federal standard for a "stop and frisk" procedure under Michigan v Long 463 US 1032 (1983). While the court conceded that the procedure followed by the police in Torres may be allowed under current federal law, the New York State Constitution (Art. I, Sec. 12) provided more protection. Noting their willingness to decide cases based on state law in the face of more expansive federal decisions (74 NY2d at 228), the court found that the officers in Torres had exceeded their authority in searching the defendant's bag. "Any residual fear that the detectives might have had about the suspect's ability to break away and retrieve the bag could have been eliminated by taking the far less intrusive step of asking the suspects to move away from the vicinity of the car." 74 NY2d at 230.

In People v Milaski, 62 NY2d 147 (1984), two officers detained a motorist based upon that individuals suspicious conduct. The

defendant explained his conduct, yet the officer's continued to detain him. A shotgun was then recovered from the defendant's vehicle, an item which proved to have been stolen in an earlier burglary. The Court of Appeals ruled that the shotgun must be suppressed since it was discovered only after the defendant's "illegal continued detention." 62 NY2d at 156. See, also, People v Chisholm, 180 AD2d 744, 745-746 (2nd Dept. 1992) ("Although the police officers properly detained the defendant to obtain explanatory information about the vehicle's registration after he admitted breaking the window, once they determined that the vehicle had not been stolen...any further detention of the defendant was unjustified"); People v Miret-Gonzalez, 159 AD2d 647, 650 (2nd Dept. 1990) (once the information on the defendant's license and the vehicle's registration had been confirmed, there was no justification for further detaining the defendant").

Clearly, then, there is precedent under New York State's Constitution, as interpreted by the courts of New York, for both the hearing court's decision and the decision of the Supreme Court of New York, Appellate Division, First Department that the continued detention of Respondent was unjustified and illegal. Despite the reference to Summers, there is no basis to believe that the hearing court made its determination based upon federal law. A simpler and more reasonable interpretation of the hearing court's decision would be a finding that the hearing court based its decision on New York State's Constitutional Law, especially in light of the fact that New York State's law is consistent with the hearing court's decision.

Thus, the federal standards and case law cited by the Petitioner are totally inopposive and inapplicable to the instant matter. Under New York State's Law, the continued detention of Respondent during the search of Apartment B was illegal and in violation of her rights under the New York State Constitution.

This was the decision of the hearing court, and the Appellate Division, First Department. There is no reason to disturb the hearing court's findings or the New York Supreme Court, Appellate Division, First Department's decision by reinterpreting the facts under federal standards.

Therefore, this Court should deny the Petitioner's Petition for a Writ of Certiorari.

II

UNDER NEW YORK STATE LAW, IN SEARCHING RESPONDENT IN THE LOBBY OUTSIDE THE SUBJECT APARTMENT, THE POLICE EXCEEDED THEIR GRANT OF AUTHORITY AS REFLECTED IN THE SEARCH WARRANT FOR 1665 GRAND CONCOURSE, APARTMENT B

At the outset of the instant point, it should be noted that there is no dispute between Petitioner and Respondent as to the power vested in the police by search warrant #039/92. By the clear language of the warrant itself, the police were empowered "to search...and seize...property." (Record on Appeal p. 4). There is no argument promulgated by the Petitioner that the plain language of the warrant authorized the search and arrest of any individual, whether located in the apartment, or within the vicinity of the apartment.

With this fact in mind, trial counsel argued to the hearing court that the police exceeded their authority in searching Respondent in the lobby outside Apartment B of 1665 Grand Concourse. As trial counsel stated, "There is no person named in this warrant. This warrant for whatever reason, is a warrant solely for the apartment. It gives no authority to seize or search any person..." (Petitioner's Writ of Certiorari, App. C, 18-19).

In support of his arguments, trial counsel cited the Court of Appeals decision in People v Green, 33 NY2d 496 (1974). In Green, detectives had gained search warrants that authorized the search of an apartment, the person of the owner and "any other person who may be found therein" (emphasis added).

The detectives observed the defendant leave the subject

apartment. Nineteen blocks away, they stopped the defendant, advised him of the warrants, searched him, found drugs on his person, and arrested him.

The Court ruled that the evidence seized from the defendant must be suppressed.

> (I)t is apparent that the search authority requested and granted was limited to the premises where the contraband was believed to be and extended only to those individuals, including the occupant, who being found therein, might reasonably be expected to conceal the contraband on their persons. This authority to search the occupant under these circumstances is not a general warrant to search his person wherever he might be found. 33 NY2d at 499 (emphasis added, citations omitted).

The court went on to note that "the authority to search is limited to the place described in the warrant and does not include additional or different places." id at 499, citing Kenningham v United States, 287 F2d 126, 129 (1960).

To date, the Green decision reflects the state of the law in New York. Cases which have distinguished Green in recent years have done so on the basis of the more expansive language contained in the warrants at issue in those matters. See, People v Easterbrook, 35 NY 2d 913 (1974) (Distinguishable from Green since the terms of the warrant were broader than the Green warrant; hence defendant could be arrested and searched as he exited apartment).

In People v Sanin, 60 NY2d 575 (1983), the defendant was searched after he had pulled his car into the driveway of his home. The warrant in that case had authorized the police to conduct a search of the defendant's person. The Court held that the search outside the defendant's home was justified, in that "the apartment

was identified only as the locus of the sales. The activities of defendant (were) the predicate for issuance of the warrant." 60 NY2d at 577.

In the instant case, it is beyond dispute that no search of any person was authorized by the warrant. Further, the activities of the Respondent was not the predicate for the issuance of the warrant - the apartment as the locus of drugs was the predicate. In fact, the police only had a vague description of the owner of the apartment as a hispanic woman, approximately 50 years old (Petitioner's Writ of Certiorari, App. C, 24). Counsel would submit that this description fits at least one quarter of the citizens of Bronx County.*

Clearly, then, the police had no authority to search the Respondent since the warrant only gave them authority to search the apartment. If Detective Bonilla had testified before the hearing court as he had twice before the Grand Jury, the People would, in all honesty, be forced to concede the suppression of the narcotics seized from Respondent.

However, the Detective raised a new issue by asserting that he and his brother officers had detained Respondent for safety reasons; after which a search of the apartment gave the police probable cause to search the Respondent. While the hearing court saw fit to credit the detective's testimony on this point (Petitioner's Writ of Certiorari, App. C, 52), it is crucial to

* It should be noted that the hearing court also felt the description was "rather broad" (Petitioner's Writ of Certiorari, App. C, 48).

note that the hearing court did not base its decision on these grounds. The hearing court suppressed the drugs at issue in this matter based upon the Court of Appeals decision in Green, which prohibits a search of a defendant without authority. The hearing court did not base its decision on the so-called "safety" issue addressed by the Petitioner.

A review of the hearing court's oral decision can lead to no other conclusion. After a lengthy discussion of the Sanin case (cited herein), the hearing court held as follows:

> Now the distinction in (the Sanin) case is a very clear one and that is (Sanin) was a named defendant. (Respondent) was not named in the search warrant in this case. It seems to me that the principles both in Green and in this case as articulated by the Court of Appeals would preclude the justification for a search outside the apartment of this defendant.
>
> Petitioner's Writ of Certiorari, App. C, 54

Therefore, despite the fact that Petitioner has chosen to concentrate on the ober dictum of the hearing court's decision and claim that the hearing court raised a federal constitutional issue in its decision, nothing could be further from the truth. The hearing court clearly based its decision on the New York State rule of law as embodied in the Green decision, a precedent which is as strong today as when it was enunciated 20 years ago.

In fact, it should be noted that the warrant at issue in the present case is more restrictive than the warrant at issue in Green. The Green warrant allowed the search of individuals found in the premises. The present warrant is devoid of such "catch-all" language.

Thus, even if, for the sake of argument, we assume that the police were justified in initially detaining the respondent for their own safety, (a point emphatically not conceded by Respondent), their warrant did not give them the authority to arrest or search the Respondent.

Petitioner has also argued that even if this court were to find that the police exceeded their authority in searching the Respondent outside of the apartment, this court should determine that the Respondent was searched incident to a lawful arrest. See, Dunaway v New York, 442 US 200 (1979); CPL Sec. 140.50(1).

It should be initially noted that this argument was not raised by the Petitioner at the hearing. Therefore, it is clearly de hors the record and unpreserved for Petitioner review at this time. See, People v Olin, 186 AD2d 74,75 (1st Dept. 1992); CPL Sec. 470.05(2).

In any event, the Appellant has not established their requisent probable cause to arrest Respondent. The mere fact that Respondent's photograph and letters addressed to her were found within the apartment does not establish any "guilty knowledge" on the part of an individual found in the lobby of the building outside the apartment. Two other individuals were arrested inside of Apartment B of 1665 Grand Concourse. A reasonable view of the evidence could lead the Court to find that the handgun and drug paraphernalia found in the apartment belonged to the two individuals found in the apartment. There was no proof submitted by the Petitioner to show that Respondent had any knowledge of drug

related activities in Apartment B.* Thus, Petitioner cannot establish the probable cause for the arrest of Respondent merely because her picture was in the apartment.

Therefore, based upon both the clear language used by the hearing court, as well as the New York State Supreme Court, Appellate Division, First Department's reliance on New York State Law as embodied in Green, this court should affirm the suppression of the property recovered from respondent due to the violation of New York Constitutional Law and as such deny the petitioner's request for a Writ of Certiorari.

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* It should be noted that although the People have included the warrant application with its description of a hispanic woman in her 50's as the owner of the apartment, in the Record on Appeal, (RA, pp. 5-8), at no time was this application made available to the hearing court. (Petitioner's Writ of Certiorari, App. C, 18-19). Thus, the application should properly be considered de hors the record since it was not available to the hearing court.

CONCLUSION

The Respondent, CARMEN REYES prays that the Court deny the People of the State of New York's petition for a Writ of Certiorari, because the case presents no issues appropriate for the court's review, and because the lower court's holdings were not in error.

Respectfully submitted,

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Supreme Court of the United States

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THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

CARMEN REYES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court may review the questions presented on the Petition for a Writ of Certiorari.

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PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

POINT

The standard, adopted in *Michigan v. Long*, 463 U.S. 1032 (1983), for determining whether a state court decision rests upon an adequate and independent state ground, permits this Court to review the questions presented in the Petition for a Writ of Certiorari.

Respondent contends that "[t]here is no federal question presented by the instant petition in that the decision below was based on New York State Law." (Respondent's brief in opposition, p. 9). This claim is in error, since its supporting argument focuses almost exclusively and inappositely on the decision at

nisi prius, avoids analysis of the decision of the state appellate court, and ignores the standard of review established by this Court in *Michigan v. Long*, 463 U.S. at 1040-1041, and recently affirmed in *Arizona v. Evans*, ___ U.S. ___, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, clearly rests on its erroneous interpretation of this Court's decision in *Michigan v. Summers*, 452 U.S. 692 (1981). The reference, in the opinion below, to *People v. Milaski*, 62 N.Y.2d 147 (1984), which cited *Sibron v. New York*, 392 U.S. 40 (1968) in its holding (at page 156) that an individual was impermissibly detained, in response to the safety prong of *Summers*, demonstrates that, at the least, the state appellate court felt "compelled by what it understood to be federal constitutional considerations to construe" respondent's continued detention during the conduct of the search. See, *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), *cit. omitted.* The mere possibility, as Respondent suggests, that the same result might have been reached if state law was considered, does not create an independent ground. See, *Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

Since an independent and adequate state ground for the decision is not clear from the face of the decision under review and there is not a plain statement by the state appellate court that federal law was "used only for the purpose of guidance," this Court's jurisdiction to entertain the issues presented by the petition is established. *Michigan v. Long, supra, Arizona v. Evans* ___U.S.___, 115 S.Ct. at 1190, ___L.Ed.2d at 43, *cit omitted.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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